91-886

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 199

No. _____

ROBERT M. ADAMS, ET AL.,

PETITIONERS,

v.

LTV STEEL MINING COMPANY, ORE MINING COMPANIES PENSION PLAN AND PENSION COMMITTEE, ORE MINING COMPANIES PENSION PLAN,

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United Stated Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5102MN

ROBERT M. ADAMS,	*	
EDWARD A. ALTO,	*	
PAUL O. ARNSON,	*	
ALLAN L. DECENT,	*	
DONALD J. FORTE,	*	
DONALD C. FOSTER,	*	
LOUIS T. GAMBUCCI,	*	
JOSEPH L. GILLILAND,	*	
WAYNE M. GUNDERSON,	*	
MARLYN R. GRUNWALD,	*	
MELVIN L. HALLIDAY,	*	
GEORGE J. HILL,	*	Appeal from
LEONARD W. HOTAKAINEN,	*	the United
RAYMOND R. HOTAKAINEN,	*	States District
MARK D. JACKSON,	*	Court for the
WALTER E. JOHNSON,	*	District of
ROBERT J. JORGENSON,	*	Minnesota.
ROBERT KAROLEVITZ,	*	
DANIEL J. KEDROWSKI,	*	
EUGENE F. KEDROWSKI,	*	
ROBERT A. KLUNE,	*	
GARY L. KOPP,	*	
JOHN E. KOVATOVICH,	*	
LAWRENCE J. LENK,	*	
ROBERT V. MAGNUSON,	*	
CLIFFORD D. MANN,	*	
CARLYLE J. MATHSON,	*	
LEO L. MATTESON,	*	
MILNE C. MILTZ,	*	
DONALD T. MOGEN,	*	
JOHN V. MONSON,	*	
ALDEN MONSRUD,	*	
DALE K. OLSON,	*	
PAUL PALO,	*	
DAVID E. PATROW,	*	
EUGENE P. PETERSON,	*	
PAUL P. PLESHA,	*	

LARRY POWELL,	*
NORMAN T. PRATT,	*
WILLIAM A. PROUT,	*
ROBERT W. PULKINEN,	*
DWIGHT F. ROBISON,	*
ARNOLD M. RUDOLPH,	*
ALLAN E. SCOTT,	*
WESLEY E. SHOSTEDT,	*
LEONARD L. SOUDER,	*
LEO J. SVIR,	*
DAVID G. SWENSON,	*
LAWRENCE TAHIJA,	*
ANTHONY R. TURK,	*
DONALD A. TYSSEDAL,	*
DONALD R. VEEDER,	*
	*
APPELLANTS,	*
	*
v.	*
	*
LTV STEEL MINING	*
COMPANY, ORE MINING	*
COMPANIES PENSION	*
PLAN AND PENSION	*
COMMITTEE, ORE MINING	*
COMPANIES PENSION PLAN,	*
	*
APPELLEES.	*

Submitted: November 15, 1990

Filed: June 13, 1991

Before LAY, Chief Judge, FAGG, Circuit Judge, and WRIGHT,* District Judge.

FAGG, Circuit Judge.

This ERISA suit arises from the Ore Mining Companies Pension Plan (the plan) sponsored by LTV Steel Mining Company (LTV) and administered by the plan's pension committee (the committee). See generally Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988). Fifty-two former and current hourly LTV employees (the employees) appeal the district court's order granting summary judgment in favor of LTV, the plan, and the committee. Forty-four of the employees assert LTV and the committee violated ERISA by breaching their fiduciary duties and discriminating against the employees in administering the

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*The HONORABLE SUSAN WEBBER WRIGHT, United States District Judge for the Eastern District of Arkansas, sitting by designation.

plan. These employees also assert LTV violated ERISA by amending the plan in practice. All the employees contend LTV violated ERISA when it formally amended the plan. We affirm.

The fifty-two employees are plan participants and members of the certified union. Forty-four of the employees applied for early retirement in 1987 under plan subsection 2.6(d), which allows a participant meeting certain age and years of service requirements to retire early if the participant "considers that it would be in [the participant's] interest to retire, and [LTV] considers that [the] retirement would likewise be in its interest and, by applying like rules in a non-discriminatory manner to like or similar circumstances, approves an application for retirement under mutually satisfactory conditions."

Before the employees applied, LTV had determined it was in the company's inter-

est to allow early retirement under subsection 2.6(d) only if the early retirement would allow the company to reduce its work force permanently. Under this guideline, LTV allowed salaried employees to retire early because they were terminable at will and the company could permanently eliminate their positions. The collective bargaining agreement with the employees' union, however, prevented reductions of the hourly, unionized work force without the union's agreement. In effect, LTV had adopted a policy of denying early retirement to all hourly employees under subsection 2.6(d) of the plan, unless the union agreed to a corresponding permanent reduction in the number of hourly jobs. LTV informed the pension committee of this policy. Consequently, when the employees applied for early retirement, the pension committee denied their applications in writing, stating early retirement was not in the company's interest. Later, after

Congress enacted the Retirement Equity Act of 1984, 29. U.S.C. § 1054(g)(2), LTV and the union agreed to amend the plan to eliminate subsection 2.6(d).

First, the forty-four employees argue LTV breached its fiduciary duties in denying them early retirement benefits under subsection 2.6(d). See 29 U.S.C. § 1104(a)(1). We disagree. The employees concede LTV acts in a dual capacity as both plan fiduciary and employer. Under the dual capacity doctrine, LTV can act "'in accordance with its interests as employer when not administering the plan or investing its assets.'" Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988) (quoted case omitted). "Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits." Dzinglski v. Weirton Steel Corp., 875 F.2d 1075, 1079 (4th Cir.), cert. denied, 110 S. Ct. 281 (1989).

Here, LTV made a business decision that early retirement was not cost effective if the retiring employee had to be replaced. We conclude LTV acted as an employer, not a fiduciary, in deciding whether the employees' early retirements were in the company's interest. See Berger v. Edgewater Steel Co., 911 F.2d 911, 918 (3d Cir. 1990), cert. denied, 111 S. Ct. 1310 (1991); Hickman, 840 F.2d at 566-67. Thus, ERISA's fiduciary standards do not govern LTV's decision to deny the employees' applications. Berger, 911 F.2d at 919.

The forty-four employees also argue the committee breached its fiduciary duties in denying their applications. The pension committee, however, had no authority to override LTV's business decision. After LTV informed the committee that early retirement was not in the company's interest, the committee could only deny the employees' requests. Berger, 911 F.2d

at 918-19. Applying the de novo standard of review, we conclude the committee did not breach its fiduciary duties in denying the employees' applications. Id.; Dzinglski, 875 F.2d at 1079.

Second, the forty-four employees argue LTV and the committee discriminated against them in violation of 29 U.S.C. § 1140 by allowing salaried employees, but not hourly employees, to retire early under subsection 2.6(d). To establish a prima facie case of discrimination under 29 U.S.C. § 1140, the employees must show: "'(1) prohibited . . . conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee[s] may become entitled.'" Berger, 911 F.2d at 922 (quoted case omitted). The employees failed to show any purposeful interference on the part of LTV or the committee. Indeed, the record reflects LTV allowed hourly employees to retire early under subsection 2.6(d) when

the retirement was accompanied by a permanent reduction in the work force. As the plan required, the committee followed LTV's determination that the employees' early retirement was not in LTV's interest. We thus conclude neither LTV nor the committee discriminated against the employees in violation of 29 U.S. § 1140.

Third, the forty-four employees argue LTV violated ERISA when it amended the plan in practice by adopting the policy of denying early retirement under subsection 2.6(d) unless the retirement was accompanied by a permanent reduction in the work force. We conclude this policy did not amend the plan. Instead, the policy was a guideline LTV used to decide whether early retirement was in LTV's interest. The plan's terms clearly allow LTV to make this decision.

A common theme pervades the employees' arguments up to this point. The employees basically complain subsection

2.6(d) is unfair because it allows LTV to decide unilaterally that early retirement is not in the company's interest. See Dzinglski, 875 F.2d at 1078. Unfortunately for the employees, however, our role is to assure the plan is fairly administered, not to rewrite plan provisions. Id. In the absence of any showing of bad faith, we decline to deny LTV of its power to decide whether early retirement is in the company's interest. See Berger, 911 F.2d at 919; Dzinglski, 875 F.2d at 1079.

Finally, all fifty-two employees argue LTV violated 29 U.S.C. § 1054(g)(2)(B) by formally amending the plan to eliminate subsection 2.6(d), with the consent of the employees' union. An employer cannot decease a participant's accrued benefit by amending a pension plan. 29 U.S.C. § 1054(g)(1). If a participant satisfies the preamendment conditions for a retirement-type subsidy, either before or after the amendment, the amendment is

treated as reducing accrued benefits. Id. § 1054(g)(2)(B). In this case, the employees have not satisfied the preamendment condition that their early retirement be in LTV's interest. See Berger, 911 F.2d at 918. Thus, the amendment does not reduce accrued benefits in violation of 29 U.S.C. § 1054(g). See id.

Accordingly, we affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Robert M. Adams, et al.,

Plaintiffs,

vs.

LTV Steel Mining Company, Ore Mining Companies Pension Plan; and Pension Committee, Ore Mining Companies Pension Plan,

Defendants.

Civil No. 5-88-104

ORDER

The above-entitled matter came on for hearing before the undersigned United States District Court Judge on January 19, 1990, on Plaintiffs' Motion for Partial Summary Judgment, and Defendants' Motion for Summary Judgment. Mr. Stanley Efron of Henson & Efron, P.A. appeared on behalf of Plaintiffs. Mr. Raymond L. Erickson and Mr. Richard J. Leighton of Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A. appeared on behalf of Defendants.

BASED UPON all the files, records and proceedings herein, and having considered the written and oral arguments of counsel,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED; and

2. Defendants' Motion for Summary Judgment is GRANTED, and that the plaintiffs' causes of action be, and hereby are, dismissed with prejudice.

Dated this 25th day of January, 1990.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

Filed Jan 29 1990
Judgment Entered Jan 29 1990

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FIFTH DIVISION

Robert M. Adams, et al.,	)	
	)	
Plaintiffs,	)	
	)	5-88 Civ 104
vs.	)	
	)	
LTV Steel Mining Company, et al.,	)	
	)	
Defendants.	)	

MOTION

January 19, 1990
St. Paul, Minnesota

Robert W. Riley
United States Court Reporter
748 U.S. Courthouse
316 North Robert St.
St. Paul, Minnesota 55101

Transcript of proceedings had in the above-entitled matter before the Honorable Robert G. Renner, one of the judges of the above court in Courtroom No. 2, U.S. Courthouse, St. Paul, Minnesota, January 19, 1990.

APPEARANCES:

On behalf of the Plaintiffs:

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On behalf of the Defendants:

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1000 First Bank Place
Duluth, MN 55802
by Raymond L. Erickson, Esq. and
Richard J. Leighton, Esq.

* * *

THE COURT: The first matter on the calendar is Adams et al versus LTV Steel Mining Company. Let's have appearances.

MR. EFRON: Stanley Efron, Henson and Efron, Your Honor, for the plaintiffs.

MR. ERICKSON: Good morning, Your Honor, Ray Erickson with the Hanft, Fride law firm and the Port of Duluth for the defendants, along with my partner, Richard Leighton.

THE COURT: Thank you. Before the Court are defendants LTV Steel Mining Company; Ore Mining Companies Pension Plan; and Pension Committee, Ore Mining Companies Pension Plan, seeking full summary judgment against plaintiff Robert M. Adams and 51 other plaintiffs. Plaintiffs allege breach of fiduciary duty, discrimination and unlawful decrease of an accrued benefit in violation of the Employee Retirement Income Security Act, ERISA, and breach of contract with regard

to the Labor Management Relations Act, LMRA. Also before the Court is a motion by plaintiffs for partial summary judgment giving certain plaintiffs the right to retire under the retirement benefits at issue in this case and an award of back pension benefits.

Because both summary judgment motions essentially require a consideration of the same issues, the Court will present one statement of facts and one discussion of the claims. However, in preparation for this hearing, the Court has studied all memoranda submitted for both motions.

This litigation centers on an early retirement program known as the "70/80 Mutually Satisfactory Retirement Program," hereinafter 70/80 program offered as part of defendant Ore Mining Companies Pension Plan, hereinafter Plan. This employee pension benefit plan is a pension plan within the meaning of ERISA, 29 USC, Section 1002(2). Defendant Pension

Committee, Ore Mining Companies Pension Plan, hereinafter Committee, administers the plan, and defendant LTV Steel Mining Company, hereinafter LTV Mining, is the employer and plan sponsor. Pickands Mather and Co., hereinafter Pickands Mather, is the managing agent for LTV Mining. The 52 plaintiffs are or were miners for LTV Mining and are participants or beneficiaries of the Plan. Plaintiffs also are or were bargaining unit members of the United Steel Workers of America, hereinafter Union.

The Ore Mining Companies Pension Plan, Section 1.1(1) provides that LTV Mining and committee are fiduciaries, but only with respect to the specific responsibilities of each as described in the Plan and the Trust Agreement. The board of directors of Pickands Mather appoints committee members who are supposed to be five in number, Plan Section 8.1. Apparently during the relevant time for this

litigation, the committee consisted of the following two people: Wayne Speicher, who was the committee's secretary and at relevant times also manager of employee benefits for Pickands Mather; and Henry Whaley, who at relevant times was a vice president for operations at Pickands Mather. It is unclear when Whaley ceased serving on the committee. Whaley testified that he was on the committee only until the end of 1986, yet documents from the committee show his signature in 1987.

The relevant provisions of the 70/80 Program at issue in this litigation are found in Section 2.6 of the Plan which states:

> Any participant who was not attained the age of 62 years and who shall have had at least 15 years of continuing service and (i) shall have attained the age of 55 years and whose combined age and years of continuing service shall equal 70 or

more, or (ii) whose combined age and service years of continuous service shall equal 80 or more, and...

(d) who considers that it would be in his interest to retire, and his employing company considers that such retirement would likewise be in its interest and, by applying like rules in a non-discriminatory manner to like or similar circumstances, approves an application for retirement under mutually satisfactory conditions, shall be eligible to retire on or after April 1, 1986, and shall upon his retirement be eligible for a pension.

For those who meet the age and service requirements, the 70/80 Program provides the possibility of early retirement with full retirement benefits, rather than benefits that are actuarily reduced.

Ordinarily, full retirement benefits are awarded only after a minimum of 30 years employment. In addition, the 70/80 Program provides a $400 monthly supplement until the retiree becomes eligible for Social Security benefits.

In the period from 1982 through April 1, 1986, LTV Mining, which was then Erie Mining Company, hereinafter Erie Mining, used the 70/80 Program as a means of permanently reducing its salaried work force. Depressed economic conditions in the industry necessitated this reduction. Erie Mining also attempted to permanently reduce its hourly work force, but these jobs involved union employees whose job classifications could not be removed from the bargaining unit without the union's agreement. Erie Mining was successful in negotiating a permanent reduction of only two positions in the hourly work force. The two union retirees whose positions were eliminated were offered participation

in the 70/80 Program. Erie Mining did not offer the 70/80 Program to any other hourly employee because such an offer would require Erie Mining to pay the early retirement benefits without achieving a permanent reduction in its hourly work force. That is, the retiree's position would have to be filled by another union member.

In 1986, one of the plaintiffs, Marilyn Grunwald, who had been told that hourly employees weren't eligible for the 70/80 Program, learned that, according to the Plan, the 70/80 Program was available to both salaried and hourly employees. After questioning company officials as to why hourly employees had not been able to apply for the 70/80 Program, Grunwald and others were told that they could apply for the 70/80 Program and that their applications would be processed. In 1987, approximately 65 to 70 hourly employees applied on their initiative for the 70/80

Program. None of these hourly employees were awarded participation in the program. Senior officials of Pickands Mather had decided that it was not in the company's best interest to offer hourly employee participation in the 70/80 program unless such an offer was part of a negotiated agreement with the union that resulted in a reduction in union positions.

Forty-seven of the plaintiffs whose applications were denied filed a grievance with the union which subsequently declined to pursue the matter. Plaintiffs filed this action alleging that defendants' rejection of the plaintiffs' 70/80 Program applications constituted a breach of the LMRA as well as unlawful discrimination and breach of fiduciary duty under ERISA.

In their complaint, plaintiffs also allege that on December 31, 1987, and without notice to plaintiffs or the union, LTV Mining unilaterally amended the Plan to eliminate the 70/80 Program. They

allege that this action constituted a breach of the LMRA and unlawful decrease of accrued benefits, discrimination and breach of fiduciary duty in violation of ERISA.

Wayne Speicher, manager of the employee benefits for Pickands Mather, testified that this amendment had been adopted on December 31, 1987. Later in the course of discovery, however, plaintiffs were informed that the amendment described above had never been adopted but had only been circulated in draft form.

One of the reasons why officials of the LTV Mining had begun to discuss an amendment to the Plan eliminating the 70/80 Program was that the Internal Revenue Service had issued proposed regulations on January 30, 1986, the purpose of which was to restrict an employee's right to receive benefits that were contingent upon the company's consent and the discretion. The benefits provided by the

70/80 Program would have been included among the restrictions, and failure to remove the discretionary benefits would have affected the favorable tax treatment afforded the Plan. To prevent this outcome, LTV Mining and the union had agreed to meet prior to the effective date of the regulation, January 1, 1989, to determine whether mutually satisfactory adjustments were possible in the relevant part of the 70/80 Program. In the course of the meetings, LTV Mining and the union found that adjustments were not possible and the union consented to have LTV Mining administer the Plan without the 70/80 Program based on mutually satisfactory conditions as of January 1, 1989. The parties agreed that a formal amendment memorializing this change will be adopted by September 1090, but the effective date of the amendment will be January 1, 1989.

For the purposes of clarity, the Court would like to lay out its under-

standing of the provisions of the 70/80 Program at issue here before dealing with plaintiffs' individual claims. First, the Court understands that initial eligibility for the Program necessitates certain age and service requirements that are not in dispute; second, the employee must agree that it would be in his interest to retire; third, the employer must agree that the employee's retirement would be in its interest; and fourth, if the previous requirements are met, the application shall be approved by applying like rules in a non-discriminatory manner to like or similar circumstances.

In the memorandum in support of their motion for partial summary judgment, plaintiffs state that the 70/80 Program is available "only when both employee and employer believe the retirement to be in their interest." Yet, plaintiffs' arguments seem to infer that they have an entitlement to the 70/80 Program inde-

pendent of the employer's agreement that such a retirement is in its interest. In Plaintiffs' Response to Defendants' Reply Memorandum, plaintiffs state that they are relying on ERISA "to vindicate their right to retire early." In a letter requesting the president of the union to invoke its grievance procedure in this matter, plaintiffs' counsel states:

> All of the plaintiffs have recently applied for 70/80 retirement benefits believing retirement to be in their interest and the company's interest, thereby establishing mutually satisfactory conditions under the Plan.

Plaintiffs' counsel is misstating the requirements by asserting that the mutually satisfactory conditions are established because a plaintiff believes retirement to be in the plaintiff's and the company's interest. The plain language of the Plan states that the employer must agree that such a retirement is in

its interest. If the opportunity to retire early is ever a right under the Plan, it certainly would not become a right at least until both the employee and employer determine that such an early retirement is in their respective interests.

In its memorandum for partial summary judgment, plaintiffs state that they "do not dispute defendants' version of its use of 70/80 nor defendants' justification for rejecting plaintiffs' 70/80 applications." Defendants assert that LTV Mining had decided that offering 70/80 Program retirement to hourly employees was not in its interest unless such an offer was accompanied by a permanent reduction in the number of hourly jobs at LTV Mining. The credibility of this assertion is supported by the fact that LTV Mining did offer 70/80 Program retirement to two hourly employees under circumstances in which it had negotiated with the union to

eliminate jobs. It seems to this Court that plaintiffs failed to create an issue in fact as to whether their employer agreed that it was in its interest to have them retire early, and that such a failure renders questions about the fourth requirement for the Program -- that is, that the application shall be approved by applying rules in a non-discriminatory manner -- moot. However, the Court acknowledges that some of the difficulties in this case result from a telescoping of steps plaintiffs followed in meeting the requirements. This has led to a lack of clarity about when the decisions were made, by whom and in what capacity. Thus, the Court will proceed to consider plaintiffs' individual claims.

Plaintiffs allege that by rejecting their 70/80 Program applications, defendants have violated their fiduciary duties pursuant to 29 USC, Section 1104. Citing 29 USC, Section 1104(a)(1), plaintiffs

assert that defendants' fiduciary obligations require them to discharge their duties solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to them. However, the parties agree that the defendants have dual roles in relationship to the plaintiffs. In some situations, the defendants are plaintiffs' employer, and in situations involving the administration of the Plan, defendants are fiduciaries. The critical question then is when were the defendants acting as the employer and when were they acting as a fiduciary in the course of the process in which plaintiffs' applications were rejected?

The answer to this question is clouded a bit by the fact that LTV mining's process for applying for the 70/80 Program did not separate requirement three -- that is, the determination whether the employee agreed that an early

retirement was in its best interest from step four -- that is, approving the application by applying non-discriminatory rules. Plaintiffs submitted their applications to local mining officials who forwarded them to a central Pickands Mather office and the committee. Apparently the persons who ultimately received the applications, Speicher and Whaley, were officials of Pickands Mather, who acted for LTV Mining. They were also committee members. They knew of and perhaps were involved in the company's blanket decision that it would not agree that early retirement for an hourly employee was in its interest unless accompanied by a job reduction. That decision on the part of the employer is clearly a business decision that is not governed by ERISA's fiduciary standards. See Hichman versus Tosco Corp., 840 F.2d 564, a 1988 Eighth Circuit decision; also Hlinka versus Bethlehem Steel Corp., 863

F.2d 279, a Third Circuit 1988 decision. Therefore, to the extent that committee members who were also Pickands Mather employees were involved in the company's decision regarding when early retirements would be in the company's best interest, they were acting as employers. Plaintiffs cite Dockray versus Phelps Dodge Corp., 801 F.2d 1149, a 9th Circuit 1986 decision, to argue that some courts have found 70/80 Program employer decisions to be governed by a fiduciary standard. That case is not relevant, however, because it does not involve an early retirement requiring mutually satisfactory conditions.

Based on its knowledge that LTV Mining did not find plaintiffs' application for early retirement in its interest, the committee sent rejection letters to the plaintiffs. Requirement four -- approval of the applications -- was not appropriate because plaintiffs had not met

requirement three -- employer requirement. The Court observed that any other responses on the part of the committee would have been a breach of its duty because it would be inappropriate for a fiduciary to grant an early retirement under the 70/80 Program when the requirements had not been met.

Plaintiffs further assert that defendants breached their duties by not stating specific reasons for the denial as required by the Plan, Section 8.2(h). However, the letters sent to plaintiffs did state that plaintiffs did not meet the mutually satisfactory conditions requirement. The Fourth Circuit in Dzinglski versus Weirton Steel Corp. at 875 F.2d 1075, a Fourth Circuit 1989 decision, found that ERISA does not require a fiduciary to disclose an employer's specific reasons for deciding that an early retirement is not in its interest. In Dzinglski, the court stated that the plan

does not allow the committee as fiduciary to examine the decision of the employer. In other words, the role of fiduciary is to communicate to the employee that the employer made the business decision that the early retirement is not in its interest. This Court is in agreement with this rationale because it maintains the distinction between the employer's decision and the fiduciary's obligation to act upon and communicate the decision once it is made.

To summarize with regard to fiduciary duty -- the parties do not dispute the facts with regard to the rejection of plaintiffs' application for the 70/80 Program. Under these facts, the Court is inclined to grant summary judgment to the defendant as it finds no violation of any fiduciary duty. Plaintiffs allege that defendants' rejection of their 70/80 Program applications also constitutes a violation of LMRA. The statutory basis of

this argument is unclear, but plaintiffs allege that LTV Mining and the union unlawfully used the collective bargaining process to restrict the availability of the 70/80 Program for union employees. This argument has no merit for several reasons. The union employees did not have an entitlement to early retirement that was capable of being restricted. The union is not a defendant in this case, and the defendants, when acting as fiduciaries, were contractually obligated by the Plan to reject plaintiffs' application because they did not meet the requirement of employer agreement.

In their complaint, plaintiffs also allege that defendants violated 29 USC, Section 1140 by unlawfully discriminating against hourly employees. Defendant argues that plaintiffs' claim is not actionable under Section 1140. Both parties cite West versus Butler at 621 F.2d 240, a 1980 Sixth Circuit decision.

In West, the court found that Section 1140 was designed to prevent "unscrupulous employers from harassing the employees in order to keep them from obtaining vested pension rights." As discussed before, and despite plaintiffs' contentions to the contrary, early retirement under the 70/80 Program is not a vested right. Plaintiffs argue that they were discouraged from and incorrectly informed about applying for the 70/80 Program, and that seems to be true. However, such actions on the part of the defendant do not rise to the level of interference with a vested right.

Plaintiffs also argue that all employees were equally entitled to early retirement. They assert that early retirement under the 70/80 Program were administered in a discriminatory manner because it was offered to salaried employees but denied to hourly employees. This argument fails because it is again based on the erroneous premise that they had a

right to early retirement under the 70/80 Program. Plaintiffs may dislike LTV Mining's rationale for rejecting their application, but the fact remains that the terms of the Program require that both the employee and the employer agree that early retirement were in their interest.

In the face of these undisputed facts, the Court does not find a legal basis on which plaintiffs can sustain their allegation of discrimination.

The Court now turns to plaintiffs' allegation that defendant unilaterally amended the plan to eliminate the 70/80 Program. The facts uncovered in the course of discovery have revealed plaintiffs' allegations to be unfounded. The affidavit of Mary T. Cushing, which plaintiffs do not dispute, states that the amendment of the Plan to eliminate the 70/80 Program was a negotiated joint decision in which both LTV Mining and the union participated.

However, plaintiffs still maintain that defendants violated the LMRA by its elimination of the 70/80 Program. Plaintiffs did not identify the specific provisions of the LMRA they alleged to have been violated. It appears to this Court that the amendment of the Plan to eliminate the 70/80 Program was achieved through bilateral negotiations and mutual agreement on the part of LTV Mining and the union and that, therefore, there was no breach of any collective bargaining agreement in violation of LMRA.

Plaintiffs also argue that the elimination of the 70/80 Program constituted an unlawful decrease of an accrued benefit in violation of ERISA, 29 USC, Section 1054(g). The Court does not dispute the value that plaintiffs place on the possibility of early retirement. However, ERISA, 29 USC, Section 1054(c)(1) states that an accrued benefit can be decreased by an amendment that satisfies the re-

quirements of 29 USC, Section 1082(c)(8). Plaintiff has created no issue of fact as to whether Section 1082(c)(8) has been followed. It appears to the Court that LTV Mining and the plaintiffs' union freely agreed to a modification of the Plan that is not precluded by ERISA, and that such an agreement was made in the manner that was legal and proper. Therefore, the Court finds that the amendments of the Plan to eliminate the 70/80 Program did not violate ERISA. Because the process by which the 70/80 Program was eliminated was mutually agreed upon by LTV Mining and the union, and in accord with the requirements of ERISA and LMRA, the Court also finds that plaintiff has created no genuine issue of fact as to whether this action constituted a breach of fiduciary duty in violation of 29 USC, Section 1104(a)(1), and/or unlawful discrimination in violation of 29 USC, Section 1140. Plaintiffs are bound by the

collective bargaining of their union. If the plaintiffs are dissatisfied with the outcome of that collective bargaining, then they must bring their complaint to their union.

Finally, plaintiffs move this Court to award early retirement under the 70/80 Program to 47 plaintiffs whose applications were rejected and to award back pension benefits. Obviously, if the Court grants summary judgment to the defendants, plaintiffs' motion must be denied. However, whatever the outcome of defendants' motion, summary judgment as requested would be inappropriate because defendants have minimally created a question of fact as to whether plaintiffs' employer agreed that plaintiffs' early retirement is in its interest.

Now, I have been as candid as possible in stating my views. Those views have been obtained from the briefs and submissions of the parties. I would ask you

now as to the facts first, have I misstated the facts? If so, let me hear from you.

MR. EFRON: Your Honor, if I may address that.

THE COURT: Very well.

MR. EFRON: I believe there is a substantial misstatement of the facts. The first set of facts that we contend have not been covered completely by the Court relates to the operation in practice of the so-called 70/80 provision. One of the things that we always feared over the years when we drew the pension plans, and particularly after ERISA came into effect in 1974, is that no matter what the plan said, the conduct of the employer in operating the plan could effectively amend it.

THE COURT: You are speaking as to your view as to the law which would govern --

MR. EFRON: No, Your Honor, I am getting at the facts, but I am giving you a basis for what I am talking about. We look here at the conduct of this particular employer in terms of the facts. It says, for example, that it made a decision -- Mr. Carlson states that in his testimony. They made a decision before these applications were made that they were not going to grant any 70/80s to hourly workers.

And the testimony they gave shows that the reason they were not going to grant any 70/80s to hourly workers is because it was less expensive to lay them off instead of offering them the kind of benefits that they offered to the salaried workers. And they also say they then conducted a reduction in force for the salaried workers, but did not conduct a reduction in force for the hourly. That's simply untrue. If you look at the Manning tables from 1982 through 1986, they re-

duced the hourly force on a permanent basis through the use of layoffs by approximately 30 to 40 percent, far greater than the percentage reduction in the salaried. What they did instead in practice, and what the facts show, is they used an early retirement window to get rid of older salaried workers without taking a chance of violating any age discrimination rules by making it a so-called voluntary program. Even there, the facts are not correct, because as the testimony shows, if a salaried worker didn't accept the proposal for this voluntary retirement, he could be demoted, and some were, until they got the message and applied for 70/80.

So in practice, this employer, the facts show, amended this plan to say something he could have said before he drew the plan, we are not going to cover any hourly workers. They put that provi-

sion in the plan. That's an employer decision when they made it.

THE COURT: What I am interested in at this time is to find out which fact you think would be important for the Court to recognize as being relevant and pertinent to your motion.

MR. EFRON: The relevant facts are that this was not a voluntary program in any event, that the employer had emasculated those provisions of the plan in operation, both as to salaried and hourly, first by making it a plan provision which they had already put in many years before, making a plan provision which only operated on their initiative. And if they offered it and you didn't like it, you got demoted. And then, hiding behind the collective bargaining agreement for the hourlies when in fact the only reason they didn't offer it to the hourlies was because it was cheaper in their view to lay off the hourlies, to reduce the force

in that fashion rather than grant them 70/80. And the Manning table that's in the evidence shows that.

THE COURT: Let me stop you there. Is there any disagreement with that addition to the facts?

MR. ERICKSON: There is, Your Honor.

THE COURT: All right. I will give you an opportunity to be heard.

MR. ERICKSON: Thank you, Your Honor.

MR. EFRON: If you look at the two agreements entered into between the union for the two people who were offered 70/80, these were not reductions in force. As they said, that's the only reason they were going to do 70/80 reductions in force, these were reclassifications and changes in work rules. If you read through the document completely, what they were trying to do is modernize their work rules, modernize the classifications. And in return, union, we're going to give you a bone. If you will agree to this, we

will give you a 70/80. We won't give it to one of these people who applied for it. We'll just give you one. You designate who gets the 70/80 under those circumstances. And we've decided that's the bone.

That's not operating into the mutually satisfactory provisions. That's another way of amending the Plan. I don't want to get away from the factual situation. I will come back to this issue in some depth --

THE COURT: I am going to give you an opportunity to argue the law.

-MR. EFRON: We'll come back to that in some depth, was whether they can amend the plan by collective bargaining. But that's the beginning of the factual error in this case, is that in fact what you recited were not the complete facts.

THE COURT: I can understand your view as to that. But do you take issue with any of the facts as stated by the

Court, realizing that you interpret them differently and you would add to them facts which you feel are important to your position?

MR. EFRON: You stated, for example, that they had made the decision that they didn't want to pay benefits without a reduction in the work force. That's simply a fact that has no support in the record. There was a reduction in the work force.

THE COURT: Why don't we change it to this -- that the defendants maintain that they did not want to grant the applications to the 70/80 Program unless there were reductions?

MR. EFRON: But the facts show that there was in fact a reduction.

THE COURT: That's a matter of argument.

MR. EFRON: No, that's a matter of their own factual material they supplied

to us, which shows a reduction in the Manning table.

THE COURT: I understand that. But that also is a matter of argument. I can't put down all the facts because we would be here all day writing facts. I am trying to get the essential facts that without which your case can't survive nor could the defendant be heard in opposition.

MR. EFRON: They said, Your Honor, they made the bald statement it wasn't in their best interest to grant this because it was too costly. It's just as costly to grant the benefits to the salaried workers. And as a matter of fact, it didn't cost the employer a dime in either case.

THE COURT: I am going to consider that argument. You can argue that.

MR. EFRON: But that's in the facts, Your Honor, because --

THE COURT: You can argue it as your position as to what the facts will be.

MR. EFRON: Well, Mr. Whaley testified to the fact on examination, and that's in the record, Your Honor.

THE COURT: What did he testify to?

MR. EFRON: He testified to the fact that in accordance with the 5500, which is also in the record, the plan was overfunded by over $40 million. And all these benefits don't come out of the employer's pocket, they come out of the plan.

THE COURT: Do you want me to agree to that?

MR. EFRON: Yes, Your Honor.

THE COURT: I will accept it.

MR. EFRON: What I am trying to point out is that what they say and what they do are two different things.

THE COURT: That's a matter of argument. I will let you argue that to your heart's content.

MR. EFRON: Now, they also make -- and you've almost found it as a factual matter. They have also made some assertions about the IRS regulations. Those are not facts, and those are not factual matters. Mary Cushing's affidavit, by the way, is not a correct interpretation of the Internal Revenue Code.

THE COURT: Are you arguing with that?

MR. EFRON: I am disagreeing with her affidavit, and I am saying that that's not a fact. She recites it as if it were a fact. And I am saying to the Court that you have --

THE COURT: All I am interested in -- and I am not trying to take the position of the IRS, accept or reject it. I am just trying to point out that the parties apparently, at least the union and the employer, have agreed amongst themselves that they have to do something as regards

the plan by reason of positions taken by the IRS.

MR. EFRON: We haven't yet completed discovery as to what the union agreed to and how they agreed to it. But I would point out if you examine the document the union apparently agreed to, all it requires is that the employer do nothing for the time period involved, and they will have the right to "amend" the Plan.

THE COURT: Are you saying then that the Court's understanding as to the dates that it recites as to the effective date for changing of the plan in accordance with IRS objections, that those dates are in error?

MR. EFRON: No. The dates are not in error, Your Honor.

THE COURT: Are you saying --

MR. EFRON: The conclusion you draw from the facts, the factual conclusion you draw is in error because in our view this

was not a real negotiation. If you read the document, there is --

THE COURT: How would you state it?

MR. EFRON: I would state it the fact the union executed the document, but in fact the document required no action on behalf of anybody for the amendment to go into effect. So it was no different --

THE COURT: Is there any disagreement with that position.

MR. ERICKSON: Your Honor, in point of fact, we have the evidence before the Court. There is no rebutting affidavit. Mr. Efron is suggesting that he has discovery, but --

THE COURT: It doesn't seem to me, though, that it's a matter of such consequence that we have to spend a lot of time arguing it. There is no question but what the union and the employer have been advised by IRS something to the effect that the plan as it presently stands needs amendment. Is that not correct?

MR. EFRON: I'm sorry, Your Honor. I was reading something.

THE COURT: Is it not correct that by virtue of the IRS actions, that the union and the employer are doing something, regardless of what it is, in response thereto? Isn't that the case?

MR. EFRON: I don't agree that it's by virtue of the IRS actions, Your Honor. The union and employer were doing something which the employer thought had to be done.

THE COURT: Let me ask you this. How come there is no corresponding affidavit against the affidavit on file saying what the IRS is doing.

MR. EFRON: Because the code itself speaks for itself, and the Treasury regulations speak for themselves. And they didn't produce any documents from the IRS. They say by interpretation that the IRS requires it. The Court can interrupt it just as well as Mary Cushing. And we can

interpret it just as well as Mary Cushing. And we don't agree with her interpretation at all.

THE COURT: Let's move on. I will reject your request for a change as to the IRS matter.

MR. EFRON: Now, the question of entitlement to an early retirement, as the Court discussed the matter, I don't think is a factual issue. That's a legal issue. So I won't argue with you about the conclusion you draw from that. But we will get to that in terms of discussing the applicable law regarding protected interests under ERISA. And that applies to this whole vested right interest.

And then the question of whether, as a matter of fact, this was a legal and proper amendment is a conclusory or legal decision and not a decision to be made by Mary Cushing. It's a matter of what follows from ERISA and the Internal Revenue Code. But what we're concerned

about, Your Honor, is the Court's acceptance of some of what is recited as fact in terms of applicable law. It's not fact.

And what happened here between 1977, when they thought they could unilaterally amend the plan, and 1979, when this amendment is taking effect, is that they discovered that the code provices certain provisions that require certain things and protect certain things. So they thought they would make an end run around the code with a so-called collectively-bargained agreement. Neither the union nor any other body can collectively bargain away anybody's ERISA rights no more than they bargain away discrimination or anything else.

THE COURT: Now you are arguing the law. I want to stick to the facts.

MR. EFRON: Those are the basic facts that we're disagreeing with, Your Honor.

THE COURT: Very well.

MR. ERICKSON: Thank you, Your Honor. For the record, I don't take exception in any material respect to the facts as the Court has recited them. I am not going to stand here and argue at length in opposition to Mr. Efron because I don't believe he has indicated to the Court where in this evidentiary record the Court could find the changes that he is asking the Court to make.

With respect to the questions of layoffs, there isn't a soul in the state of Minnesota that doesn't know that each of the mining industries in the first half decade of 1980 went through horrendous layoffs. The difference, Your Honor, is that a layoff is temporary. The layoff is subject to calling back rights. They are not permanent reductions in the work force. So we can argue at length about layoffs. But in point of fact, we're talking about permanent reductions. So that they company will not have a payroll

in the future as to which employees will have recall rights.

Secondly, Your Honor, there is no counteraffidavit to that of Mr. Whaley to the effect that there were in fact two job position eliminations in 1987 that led to the award at the request of the union of 70/80 pension to bargain unit members. So again, Mr. Efron is unable to cite any factual basis for a suggestion that the Court should change its facts in some material respect.

Thank you, Your Honor.

THE COURT: I am going to recognize that it's plaintiffs' position that the employer made a conscious decision to act the way it did with regard to the 70/80 Program because it found it less expensive to lay off rather than to grant program benefits. I recognize that as the plaintiffs' position. Other than that, the suggested fact to be added seems to me to be more argument. I have no problem with

recognizing them as facts that plaintiffs believe should be recognized. But for purposes of the motion, I do not believe it is necessary.

Mr. Efron, I am going to give you 15 minutes to argue at this time.

MR. EFRON: Thank you, Your Honor. Let me just add to the response and comments from counsel -- that if you looked at Exhibits 5 and 6 to Mr. Ginsburg's affidavit, which deals with precisely the letters between Erie Mining and the local steel workers, it does describe in great detail how the so-called 70/80s came about.

With respect, Your Honor, to the legal issues, the --

THE COURT: By the way, I forgot to give the parties the opportunity to challenge the Court's application of the law. I don't mean to say that you have to agree with the Court's interpretation as to the facts and the law to be applied to

the facts at hand. But has the Court generically misstated any law?

MR. EFRON: I think with respect to the Internal Revenue Code and ERISA, yes, Your Honor. And I want to get to that by first starting out with --

THE COURT: I just want to give you the opportunity to state for the record. You have stated it for the record. Now you can argue it to your heart's content.

Yes.

MR. ERICKSON: I have no quarrel with the Court's recitation of the law.

MR. EFRON: In 1989, Your Honor, Firestone Tire versus Bruch case in the Supreme Court, made an important change in the standard for judicial review of this type of conflict between employees and employers, because up until Firestone versus Bruch, the general impression was that if the administrator made a decision, it was entitled to great weight, deference, et cetera. And the Supreme Court

clarified that, but pointing out that the discretion to determine eligibility or interpreting a plan must be exercised in good faith. That was argued very seriously before the Supreme Court, the employer arguing that good faith wasn't an issue.

The Dockray case which the Court alluded to earlier also points out -- and that's a Ninth Circuit case -- that substantial deference is granted to a decision of a wholly independent fund trustee, but not to an administrator who is a member of the employer management. We think that's important to the standard of review here, because here we have an administrator and management where you can't tell who is who at any given point in time, or whether in fact they exercised any discretion at all.

We know for a fact, Your Honor -- and I should have alluded to this earlier in the discussion of the facts -- that no rules were created, despite the fact that

the plan says that the plan is to be applied in accordance with rules promulgated in a non-discriminatory manner. That language, by the way, is probably unique to this among the various 70/80 cases when they talk about applying it according to rules in a non-discriminatory manner.

With the background about the fiduciary aspects, I want to separate out what is an employer decision here from what is a fiduciary decision. If you are involved in administration of the plan assets, it is said in the courts that you are involved in a fiduciary decision. And you can look at Trenton versus Scott Paper, Moore versus Reynolds, Cunha versus Ward, Hickman versus Tosco, which is the Eighth Circuit case. All say that the decisions that don't involve administration of plan assets are employer decisions.

For example, in Hickman, which the Court alluded to, or counsel did, I can't

remember which, that was a case where the employee was being terminated. He wanted to be extended to retirement age. And they terminated him instead. The Court said that's an employer decision to fire him instead of extending him to retirement age. It has nothing to do with the plan. In Cunha versus Ward, the employer decision to terminate the plan as a whole was said to be an employer decision, it's not protectable. In Moore versus Reynolds, they decided not to establish a plan, and that was an employer decision that was not protectable. And even in Trenton versus Scott Paper, the design of the benefit plan was an employer decision, and not protectable.

So in this case, for example, as other courts have pointed out, had LTV or its predecessor, Erie Mining, decided the design of this plan that they were only going to give a 70/80 mutually satisfactory where there was a permanent reduc-

tion force, they could have easily said so. As a matter of fact, they did say so in a, b and c. But in subparagraph d, they added something above and beyond that. And this was the provision for mutually satisfactory in the interest of both parties. So they've designed the plan with that in it, and now we come to administering it. And it's our view, our interpretation of the Supreme Court decision and the cases that have come down, including Dockray and Hlinka and Dzinglski, that this was an administration, a fiduciary act, not an employer act.

THE COURT: Couldn't they have made it much clearer, though, by expressing proper articulation of what it was they intended?

MR. EFRON: I don't follow that, Your Honor.

THE COURT: You are separating out the third part of it, the mutual interest

part, and saying this part has nothing to do with the employer's decision. This is the part that mandates administration of the plan.

MR. EFRON: What I am saying is that whenever you are designing a plan, if you didn't want to put this provision in, you didn't have to. Once you put it, you've got certain standards you have to follow in administering it. And once you put it, as we'll get to in the argument about what ERISA protects, you can't take it out because it's an early retirement provision. You can't take it out without following certain provisions. And that's why their initial decision to unilaterally amend it was abrogated, and they said well, we better get the union to consent or find some other way of getting out of this thing. And they said in their own affidavit, we would have violated the Internal Revenue Code. We maintain they

did violate it. That's the thrust of what we're arguing about here.

We've got two groups of employees here, by the way, Your Honor. We've got those who were eligible for the provision involved and those who are not yet eligible for it, a handful of those seven or eight of the plaintiffs, but will be eligible in due course for it. And they're claiming that they're protected as well, and that they're entitled to the protection by this Court of that benefit, because if you look at the Treasury regulations, the very Treasury regulations that they were pointing to, that the defendants were pointing to as being the problem for them, you take a look at Treasury regulation Section 1.411(d)(4), they have a question number 2 under those regulations, a question posed by the Treasury and answered by them. And in that it says that a 70/80 type benefit -- that is, an early retirement type benefit

-- can only be entered under certain conditions.

Comparable subsidy, the elimination is necessary for favorable tax treatment. But they could have gotten favorable tax treatment just by appointing an independent trustee to make those decisions because the gravamen of the problem with the IRS was the employer shooting craps in his own hat, so to speak, telling you what was on the dice. The IRS said you can't do that. You can't play games with this sort of thing. So all they had to do was appoint an independent trustee to make that decision as a fiduciary, and they would have eliminated the problem.

Under question two, the answer says, "This provision specifically protects the subsidized early retirement benefit, even for those who have not yet reached the retirement trigger age," that small group of our plaintiffs. If you will read that question and the answer, Your Honor, I

think it gives a much clearer explanation than anything I could possibly give as to why this was a protected right, and why it could not be removed by collective bargaining or in any other way except by substituting something of equal value or by modifying the process so that they eliminated the potential for abuse by the employer, which was exactly what the Internal Revenue Service was just trying to do with the change in 1986.

Now, let's go back a little bit to the 70/80 eligibility thing. Dzinglski versus Wierton Steel, that's a case that wasn't a 70/80 case at all. It's not even an early retirement case. The plaintiff had been fired. He applied on the same day after he had been fired, he applied for early retirement. That is hardly analogous facts. And the Court throws out all of the discussion of early retirement on that basis. This man cannot come in the back door, they said. He's already

been fired. You can't then apply for early retirement. You are done as an employee.

Hlinka said the eligibility for 70/80 is a business decision. It's an employer decision where no evidence of discrimination is present. It's not this case. And Dockray said in parallel circumstances -- it didn't involve a 70/80, but it was a parallel early retirement provision -- that eligibility is a fiduciary decision. Notwithstanding the fact that we read this and we say mutually satisfactory, what does mutually satisfactory mean? And what it means is that you have to, in the absence of rules -- and there weren't any rules -- that you have to administer this in a non-discriminatory manner.

THE COURT: You have five minutes.

MR. EFRON: The LMRA applicability, it is not as complex as it might appear. A violation of ERISA is a violation of the Labor Management Relations Act. So when

the union and the employer connive, conspire, agree, whatever you want to call it, to violate ERISA, it violates the Labor Management Relation Act. That's what creates that particular cause of action. They argue that we were dissatisfied with the fruits of the contract negotiations. You darn right we were dissatisfied with the fruits of the contract negotiations, because first the employer says there is no 70/80 for hourly workers. Then they say oh, there are two separate plans, and only the salaried have that. Then they split off the salaried in 1986. Notice they preserved the 70/80 for the salaried. They said new salaried hires are not going to get 70/80. They could have done that for the hourly just as easily, and said we will leave it in, freeze it for those who are here, new hourlies are not going to get 70/80. They didn't do that. They discriminated even in that way. They just abolished it

completely. They tried to abolish it in '87 immediately after our plaintiffs applied. They said oh, my God, we've got something we can't control here. Let's get rid of it. And they found out they couldn't get rid of it, because the code provides otherwise. So they tried by collective bargaining to get rid of it. And they couldn't get rid of it in that fashion, because you can't bargain away a protected right.

And the Treasury regulations and the Internal Revenue Code, Section 411(d)(6), which is an ERISA provision codified in the Internal Revenue Code, simply says any retirement subsidy, any early retirement provision is a protected benefit. It doesn't have to be vested to be protected. It's a protected benefit which you cannot take out of a plan and which you can't apply discriminatorily when it's in the plan.

That's the gist of our argument, Your Honor. The gist of our argument is on the legal issues -- that in fact they amended this plan. They amended it in operation. They amended it exactly and as what we fear when we draw these plans. In operation they simply said, we've got two plans here. We've got a salaried plan and we've got an hourly plan. And the hourlies we're not going to give them any mutually satisfactory, because it doesn't fit our profile of what we want to do. We would rather have the older workers than train new ones. That's the reason. The fact of life is, Your Honor, they've got to retire anyway. They've got to train new ones in any event. And that happens all the time. And many of these people are already retired now under the normal retirement provisions, since this took place a few years ago. And they're training replacements, just like they trained replacements for the salaried workers. It's a phony

reason. But the beauty of the salaried situation is that they're more technically qualified. The young people know how to operate computers and that sort of thing, and they're more technically qualified -- and they testified to that -- whereas with a miner, a miner is a miner, whether he is young or old and so forth.

But from the miner's point of view, it's a different matter. You are on a yo-yo. Starting in 1982 through 1987, if you look at the Manning tables that are part of the exhibits, they laid off enormous numbers of people. They called back some, laid off some, called back some. They were on a constant yo-yo. It's a wonderful employment situation when you are being laid off, called back, laid off, called back, and you don't know whether things are going to go on or not. You want to go on with your life. They wanted, like those salaried people who took early retirement, they wanted to go

off and do something else with their life at an age where they could still do it and with that early retirement subsidy. And it is true, the employer could have operated this plan in a way that was in accordance with the plan provisions and denied 70/80, and done it in a non-discriminatory way, and they didn't do it.

And I'll give you the most classic example of how to do it the right way. It's from Shaw versus NVF -- which I thought I had here with me -- in which the employer's committee after summarily turning it down went back on rehearing --

THE COURT: That's all right. Just when you get the citation, give it to me.

MR. EFRON: The Shaw case is cited. But the employer committee went back on rehearing and said this is a man who is involved in making policy decisions for us. And he is unique. And therefore, we have a good reason for not giving him a 70/80 even though we've granted other

people 70/80. In this case, they made no attempt to do that sort of thing. They didn't sit down and say, is there really a cost factor for the hourly workers that is not there for the salaried workers? After all, we take these benefits completely out of the pension plan. And we're overfunded by $45 million. And there wasn't any dispute about that. Does this really cost us anything now? Maybe it will cost us something down the line when we use up this excess. They didn't go through any of the reasoning on either decision. All they knew was in their view it was cheaper to get rid of the salaried by early retirement window and cheaper to keep the hourlies on the layoff yo-yo.

That's our view of the law, Your Honor -- that this is a protected benefit under ERISA, under the Internal Revenue Code codification of ERISA. And no matter what they say about how they operated it, the fact of life is that they amended this

out of the plan in a discriminatory fashion. And they could have done that when they formed the plan. That's an employer decision. But they can't do that unilaterally or even with the union's agreement once it's in the plan. Had they operated the provision properly, we wouldn't be here today. But they didn't. They simply said that provision isn't there for you.

Thank you, Your Honor

THE COURT: Mr. Erickson.

MR. ERICKSON: Thank you, Your Honor. I will be brief. I will confine my comments only to respond to what Mr. Efron has raised in his argument to the Court. His reliance upon Firestone versus Bruch I believe is misplaced, and we have addressed that in our brief. It's misplaced for the principal reason that the Supreme Court in Bruch made very clear that if the plan document vests discretion into the fiduciaries, the Court then uses

as a standard of review the arbitrary and capricious standard, which means that the Court has to find that there is essentially no rational basis for the decision that the committee made. In this case, I think the Court in its suggested findings at least has indicated that there was a rational basis.

But beyond that, Your Honor, with the contract language involved here -- and it isn't unilaterally imposed contract language, it's language that's negotiated through the Labor Management Relations Act -- there was no discretion in the committee. I am sure that Mr. Efron and his clients would have entirely different view of the matter had the company said, Mr. Adams, you are getting early retirement, you get out of here, and Mr. Adams didn't want it. Mutuality is a very simple thing. It requires mutuality. It requires a common agreement. To avoid all that, the plaintiffs urge the Court to

subvert the negotiating process. Unfortunately for the plaintiffs, the language before the Court is not unique to this particular company.

The language in Bethlehem, in the Hlinka case is exactly the same. And the reason is that it was commonly negotiated and is standard to the industry. The record reflects that the same language was applicable at Hibbing Taconite Company. And the same language is applicable at Pickands Mather Services, Inc.

Now, how do the plaintiffs contend that this Court should exert jurisdiction over unions and parties that are not here present? They don't do it by way of affidavit, and they don't do it by way of any factual citation. Rather, they urge that the Court somehow misread the language that they read to the Court itself. The regulations promulgated by the Treasury Department permit the parties to look at alternatives to the mutually

satisfactory provision. Well, if they were to hire an independent trustee, as the plaintiffs would urge, the trustee is still bound by the contract language that both parties, including these plaintiffs through their agent, the union, negotiated. And that trustee, on his fiduciary duty basis, is also bound by the very same language.

For understandable reasons, the plaintiffs seek to distinguish Hlinka, Dzinglski and Hickman versus Tosco. Your Honor, the distinctions are inconsequential. The American philosopher William James said, there is no difference that doesn't make a difference. And we can all agree that the plaintiffs have different names, that they may have had different jobs. But in Hlinka, you have the same contract language, and you have the very same principles of fact and law that was in fact addressed by the Third Circuit, by the district court initially,

which granted summary judgment. And that was affirmed on appeal.

Now, the plaintiffs would like the Court to apply Shaw versus NVF. Unfortunately, Shaw versus NVF was reversed on appeal summarily. And we cited that in our brief.

When we get down to the final analysis, where is the discrimination? On one hand they say we should be treated like salaried employees. On the other hand they don't recognize in any way, shape or form that they are not salaried employees, that they are not employees at will, that they do in fact have the protections of a collective bargaining agreement. Unfortunately, they don't like those protections either. They also don't recognize that when the salaried employees went through the reductions in force -- and by that I mean permanent reductions -- they couldn't come back anymore. They were off the yo-yo, all right. They

didn't have a job. When they didn't come back to work, there wasn't work available. Now there is work available. The conditions are altogether different. As Mr. Whaley's affidavit makes clear, not only have all the bargaining units who had recall rights been called back, but the company is hiring off the street, hiring new people because it's a different enviroment than it was when the earlier applications were made.

The bottom line here, Your Honor, we suggest, is that when you do compare likes and likes, when you compare what the company did with respect to a permanent reduction and bargaining unit positions, 70/80 pensions were in fact grandted. These plaintiffs do not allege to the Court, do not assert in any way, shape or form that their jobs were going to be permanently eliminated. As a consequence, we don't have like circumstances.

Thank you, Your Honor.

THE COURT: Very well, I am ready to rule. The Court wishes to congratulate you, Mr. Efron, You have raised an ingenious argument, one that captured the fancy of the Court. Unfortunately, the Court cannot follow to its complete conclusion the position you advocate. I just have to recognize that the cited cases go against you in ultimate disposition rather than support your position.

I am clearly of a mind that the mutuality provision governs and that, unfortunately for your position, it governs against you. So I am going to grant the motion for summary judgment with prejudice against the defendant and deny the plaintiffs' motion for partial summary judgment.

I will ask --

MR. ERICKSON: Excuse me, Your Honor. Did you mean --

THE COURT: What did I say?

MR. ERICKSON: Plaintiffs.

THE COURT: I am going to grant defendants' motion for summary judgment and dismiss the case with prejudice. I said it wrong. All right.

And so that the record will then reflect what I intended, I am going to deny the plaintiffs' motion for partial summary judgment.

Are there any questions? Very well. I'll ask the defendant to prepare the Court's order.

United Stated Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5102MN

ROBERT M. ADAMS,	*	
EDWARD A. ALTO,	*	
PAUL O. ARNSON,	*	
ALLAN L. DECENT,	*	
DONALD J. FORTE,	*	
DONALD C. FOSTER,	*	
LOUIS T. GAMBUCCI,	*	
JOSEPH L. GILLILAND,	*	
WAYNE M. GUNDERSON,	*	
MARLYN R. GRUNWALD,	*	
MELVIN L. HALLIDAY,	*	
GEORGE J. HILL,	*	Appeal from
LEONARD W. HOTAKAINEN,	*	the United
RAYMOND R. HOTAKAINEN,	*	States District
MARK D. JACKSON,	*	Court for the
WALTER E. JOHNSON,	*	District of
ROBERT J. JORGENSON,	*	Minnesota.
ROBERT KAROLEVITZ,	*	
DANIEL J. KEDROWSKI,	*	
EUGENE F. KEDROWSKI,	*	
ROBERT A. KLUNE,	*	
GARY L. KOPP,	*	
JOHN E. KOVATOVICH,	*	
LAWRENCE J. LENK,	*	
ROBERT V. MAGNUSON,	*	
CLIFFORD D. MANN,	*	
CARLYLE J. MATHSON,	*	
LEO L. MATTESON,	*	
MILNE C. MILTZ,	*	
DONALD T. MOGEN,	*	
JOHN V. MONSON,	*	
ALDEN MONSRUD,	*	
DALE K. OLSON,	*	
PAUL PALO,	*	
DAVID E. PATROW,	*	
EUGENE P. PETERSON,	*	
PAUL P. PLESHA,	*	

LARRY POWELL,	*
NORMAN T. PRATT,	*
WILLIAM A. PROUT,	*
ROBERT W. PULKINEN,	*
DWIGHT F. ROBISON,	*
ARNOLD M. RUDOLPH,	*
ALLAN E. SCOTT,	*
WESLEY E. SHOSTEDT,	*
LEONARD L. SOUDER,	*
LEO J. SVIR,	*
DAVID G. SWENSON,	*
LAWRENCE TAHIJA,	*
ANTHONY R. TURK,	*
DONALD A. TYSSEDAL,	*
DONALD R. VEEDER,	*
	*
APPELLANTS,	*
	*
v.	*
	*
LTV STEEL MINING	*
COMPANY, ORE MINING	*
COMPANIES PENSION	*
PLAN AND PENSION	*
COMMITTEE, ORE MINING	*
COMPANIES PENSION PLAN,	*
	*
APPELLEES.	*

Filed: August 05 1991
Francis E. Dosal, Clerk

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 1991

The appellees shall recover from the appellants the sum of $109.20 as taxable costs on appeal.

A true copy.
ATTEST: /s/ Michael E. Gais,
Acting Clerk

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 8/2/91

United Stated Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5102MN

ROBERT M. ADAMS, et al.,	*	
	*	
APPELLANTS,	*	Appeal from
	*	the United
vs.	*	States District
	*	Court for the
LTV STEEL MINING	*	District of
COMPANY, et al.,	*	Minnesota.
	*	
APPELLEES.	*	

Appellant's petition for rehearing has been considered by the Court and is denied.

July 26, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gais

Clerk, U.S. Court of Appeals, Eighth Circuit

29 U.S.C. § 141. Short title--Declaration of policy

(a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures

for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157];

...

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities

by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the sound-

ness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) **Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries.** It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by

requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to

meet minimum standards of funding, and by requiring plan termination insurance.

Note: balance of 29 U.S.C. §§ 1001-1461 omitted except as specifically cited in Table of Authorities

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond;

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee

organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(g) **Decrease of accrued benefits through amendment of plan.** (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281 [29 U.S.C. § 1082(c)(8) or 1441].

(2) For purposes of paragraph (1), a plan amendment which has the effect of--

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a partici-

pant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

...

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circum-

stances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

29 U.S.C. § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 U.S.C.

§ 1132] shall be applicable in the enforcement of this section.

Treas. Reg. § 1.411(d)-4. Section 411(d)(6) [29 U.S.C. § 1054(g)] protected benefits.--

Q-1: What are "section 411(d)(6) protected benefits"?

A-1: (a) **In general.** The term "section 411(d)(6) protected benefit" includes any benefit that is described in one or more of the following categories--

(1) benefits described in section 411(d)(6)(A),

(2) early retirement benefits and retirement-type subsidies described in section 411(d)(6)(B)(i), including qualified social security supplements as defined in § 1.401(a)(4)-12(q), and ...

Such benefits, to the extent they have accrued, are subject to the protection of section 411(d)(6) and, where applicable, the definitely determinable requirement of section 401(a) (including section 401(a)(25)) and cannot, therefore, be reduced, eliminated, or made subject to employer

discretion except to the extent permitted by regulations. ...

(c) **Plan terms--**(1) **General rule.** Generally, benefits described in section 411(d)(6)(A), early retirement benefits, retirement-type subsidies, and optional forms of benefit are section 411(d)(6) protected benefits only if they are provided under the terms of a plan. ...

(d) **Benefits that are not section 411(d)(6) protected benefits.** The following benefits are examples of items that are not section 411(d)(6) protected benefits: (1) ancillary life insurance protection; (2) accident or health insurance benefits; (3) social security supplements described in section 411(a)(9), except qualified social security supplements as defined in § 1.401(a)(4)-12; (4) the availability of loans (other than the distribution of an employee's accrued benefit upon default under a loan); (5) the right to make after-tax employee

contributions or elective deferrals described in section 402(g)(3); (6) the right to direct investments; (7) the right to a particular form of investment (e.g., investment in employer stock or securities or investment in certain types of securities, commercial paper, or other investment media); (8) the allocation dates for contributions, forfeitures, and earnings, the time for making contributions (but not the conditions for receiving an allocation of contributions or forfeitures for a plan year after such conditions have been satisfied), and the valuation dates for account balances; (9) administrative procedures for distributing benefits, such as provisions relating to the particular dates on which notices are given and by which elections must be made; and (10) rights that derive from administrative and operational provisions, such as mechanical procedures for allocating

investment experience among accounts in defined contribution plans.

Q-2: To what extent may section 411(d)(6) protected benefits under a plan be reduced or eliminated?

A-2: (a) **Reduction or elimination of section 411(d)(6) protected benefits--** (1) **In general.** A plan may not be amended to eliminate or reduce a section 411(d)(6) protected benefit that has already accrued, except as provided in sections 412(c)(8) and 4281, and in paragraph (b) of this Q&A-2. This is generally the case even if such elimination or reduction is contingent upon the employee's consent. However, a plan may be amended to eliminate or reduce section 411(d)(6) protected benefits with respect to benefits not yet accrued as of the later of the amendment's adoption date or effective date without violating section 411(d)(6).

...

(b) **Section 411(d)(6) protected benefits that may be eliminated or reduced only as permitted by the Commissioner--** (1) **In general.** The Commissioner may, consistent with the provisions of this section, provide for the elimination or reduction of section 411(d)(6) protected benefits that have already accrued only to the extent that such elimination or reduction does not result in the loss to plan participants of either a valuable right or an employer-subsidized optional form of benefit where a similar optional form of benefit with a comparable subsidy is not provided or to the extent such elimination or reduction is necessary to permit compliance with other requirements of section 401(a) (e.g., sections 401(a)(4), 401(a)(9) and 415). The Commissioner may exercise this authority only through the publication of revenue rulings, notices, and other documents of general applicability.

(2) **Section 411(d)(6) protected benefits that may be eliminated or reduced.** The elimination or reduction of certain section 411(d)(6) protected benefits that have already accrued in the following situations does not violate section 411(d)(6). The rules with respect to permissible eliminations and reductions provided in this paragraph (b)(2) are effective January 30, 1986. These exceptions create no inference with respect to whether any other applicable requirements are satisfied (for example, requirements imposed by section 401(a)(9) and section 401(a)(14)).

(i) **Change in statutory requirement.** A plan may be amended to eliminate or reduce a section 411(d)(6) protected benefit if the following three requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of section

7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans. In general, the elimination or reduction of a section 411(d)(6) protected benefit will not be treated as necessary if it is possible through other modifications to the plan (e.g., by expanding the availability of an optional form of benefit to additional employees) to satisfy the applicable qualification requirement.

...

Q-4: May a plan provide that the employer may, through the exercise of discretion, deny a participant a section 411(d)(6) protected benefit for which the participant is otherwise eligible?

A-4: (a) **In general.** Except as provided in paragraph (d) of Q&A-2 of this section with respect to certain employee stock ownership plans, a plan that permits

the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6). A plan provision that makes a section 411(d)(6) protected benefit available only to those employees as the employer may designate is within the scope of this prohibition. Thus, for example, a plan provision under which only employees who are designated by the employer are eligible to receive a subsidized early retirement benefit constitutes an impermissible provision under section 411(d)(6). In addition, a pension plan that permits employer discretion to deny the availability of a section 411(d)(6) protected benefit violates the definitely determinable requirement of section 401(a), including section

401(a)(25). See § 1.401-1(b)(1)(i). This is the result even if the plan specifically limits the employer's discretion to choosing among section 411(d)(6) protected benefits, including optional forms of benefit, that are actuarially equivalent.

...

(b) **Exception for administrative discretion.** A plan may permit limited discretion with respect to the ministerial or mechanical administration of the plan, including the application of objective plan criteria specifically set forth in the plan. Such plan provisions do not violate the requirements of section 411(d)(6) or the definitely determinable requirement of section 401(a), including section 401(a)(25). For example, these requirements are not violated by the following provisions that permit limited administrative discretion: (1) commencement of benefit payments as soon as administratively feasible after a stated

date or event; (2) employer authority to determine whether objective criteria specified in the plan (e.g., objective criteria designed to identify those employees with a heavy and immediate financial need or objective criteria designed to determine whether an employee has a permanent and total disability) have been satisfied; and (3) employer authority to determine, pursuant to specific guidelines set forth in the plan, whether the participant or spouse is dead or cannot be located.

...

Q-6: May a plan condition the availability of a section 411(d)(6) protected benefit on the satisfaction of objective conditions that are specifically set forth in the plan?

A-6: (a) **Certain objective conditions permissible--**(1) **In general.** The availability of a section 411(d)(6) protected benefit may be limited to employees

who satisfy certain objective conditions provided the conditions are ascertainable, clearly set forth in the plan and not subject to the employer's discretion except to the extent reasonably necessary to determine whether the objective conditions have been met. Also, the availability of the section 411(d)(6) protected benefit must meet the nondiscrimination requirements of section 401(a)(4). See § 1.401(a)-4.

...

Q-9: What are the applicable effective date rules for purposes of this section?

A-9: (a) **General effective date.** Except as otherwise provided in this section, the provisions of this section are effective January 30, 1986.

...

(c) **Existing plans--** ...

(3) **Existing collectively bargained plans.** With respect to existing

collectively bargained plans this section is effective for the later of the first day of the first plan year commencing on or after January 1, 1989, or the first day of the first plan year that the requirement of section 410(b) as amended by TRA '86 apply to such plan.

...

(d) **Delayed effective date not applicable to new alternatives or conditions--**(1) **In general.** The delayed effective dates in paragraphs (c)(2) and (c)(3) of this Q&A-9 for existing plans are only applicable with respect to a section 411(d)(6) protected benefit if both the section 411(d)(6) protected benefit and the condition providing employer discretion as to the availability of such benefit are both adopted and in effect prior to August 1, 1986. If the preceding sentence is not satisfied with respect to a particular section 411(d)(6) protected benefit, this section is

effective with respect to such section 411(d)(6) protected benefit as if the plan were a new plan.

(2) **Addition of discretion on or after January 30, 1986.** The delayed effective dates in paragraphs (c)(2) and (c)(3) of this Q&A-9 are not available with respect to any section 411(d)(6) protected benefit if the section 411(d)(6) protected benefit was provided for in the plan prior to January 30, 1986, and the availability of such benefit was made subject to the exercise of employer discretion on or after January 30, 1986. If the conditions set forth in this paragraph are not satisfied with respect to a particular section 411(d)(6) protected benefit, this section is effective with respect to such section 411(d)(6) protected benefit as if the plan were a new plan. A limited exception is provided with respect to existing plans that provided a particular section 411(d)(6)

protected benefit prior to January 30, 1986, and then amended the plan after January 30, 1986, and before August 1, 1986, to add a provision for employer discretion with respect to the availability of such benefit. Such plans are required to have been amended retroactively by December 31, 1987, to remove such provision for employer discretion, and, if the benefit made subject to such discretion was subsequently eliminated, the plan is required to have been further amended, by the same date, to retroactively reinstate the benefit.

(3) **Exception for certain amendments covered by a favorable determination letter.** If an amendment adding a section 411(d)(6) protected benefit subject to employer discretion was adopted or made effective after August 1, 1986, and the plan receives a favorable determination letter covering such provision with respect to an application for such

letter made prior to July 11, 1988, then the effective date for purposes of amending such provision under the transitional rules is the applicable effective date determined under the rules with respect to existing plans.